

IN THE

Supreme Court of the United States

TERM

No. **79-551**

DAVID BELL.

Appellant,

v.

NEW YORK STATE LIQUOR AUTHORITY

Appellee.

WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR SECOND CIRCUIT

DAVID BELL, PRO SE
Appellant
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I. OPINIONS OF THE COURTS BELOW

Bell vs. State Liquor Authority		
&		
State Liquor Authority vs. Beal		
Properties	48 AD 2d 83	
Bell vs SLA	62 Ad 2d 1066	
Bell vs. SLA	44 NY 2d 647	
Bell vs. SLA	47 LW 3452	
Bell vs SLA	USDC SDNY	79 Civ 253
Bell vs. SLA	Ct. of App	
2nd Circ.		79-7197

II. JURISDICTION

1. Jurisdiction of this court issues from 28 USC 1254 sub 1 of Federal Rules of Judicial Procedure.

2. Judgement of the Court of Appeals was entered on June 27, 1979.

3. An order extending the time to file the petition for writ to November 24, 1979 was entered on August 29, 1979.

4. Title 28 USC sect 1254 sub 1 confers jurisdiction on the Supreme Court to review judgements of Courts of Appeal which are in conflict with decisions of other circuits. Dissenting opinions in the Supreme Court have taken similar positions.

III. QUESTION PRESENTED FOR REVIEW

The question raised by this appeal is: By what threshold proceeding can petitioner raise the issue of the constitutionality of a state statute, which on it's face is unconstitutionally vague; and in what state or federal court should this issue be raised and argued on it's merits?

IV. CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED.

1. The 14th amendment of the United States Constitution states: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within it's jurisdiction the equal protection of the law.

2. Title 28 USC sect 1343 - 3 states: The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

3, Section 106 sub 6 of the New York State Alcoholic Beverage Control Law states: No person licensed to sell alcoholic beverages shall suffer or permit gambling on the licensed premises , or suffer or permit such premises to become disorderly.

V. WHEN QUESTION WAS RAISED

Petitioner exhausted New York State appellate proceedings in which the question of the constitutionality of sect. 106-6 of the ABC Law was raised and pointedly ignored by state courts; beginning with the administrative hearings through the appeal to the New York Court of Appeals.

In the district court the same question was raised and dismissed without the merits of the issue being reached.

VI. STATEMENT OF THE CASE

In 1974, the New York State Liquor Authority cited petitioner- licensee for allegedly violating sect. 106-6 of the ABC Law. In the administrative hearings which followed, licensee raised the question that the statute was unconstitutionally vague and therefore null and void. The issue was ignored and the State Liquor Authority revoked the license issued to petitioner. On appeal to appellate court the same issue was raised and the court barred fact finding and upheld the authority on other grounds. The New York Court of Appeals denied leave to appeal. Having exhausted state remedies, petitioner appealed directly to the United States Supreme Court which dismissed for lack of jurisdiction.

Petitioner then commenced the instant action in District Court SDNY and requested that a three judge court be convened. The defendant raised the issue of the bar of res judicata and the district court dismissed on those grounds. The Court of Appeals for 2nd circuit affirmed the lower court. This petition for writ of certiorari followed

VII. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

Jurisdiction was invoked in the district court by 28 USC 1343 sub 3 and 1395, and 42 USC 1981, 1983 and 1985; and the 14th amendment of the United States Constitution.

VIII. ARGUMENT

Petitioner- licensee has unsuccessfully sought to challenge the constitutionality of Sect. 106-6 of the New York State ABC Law in all state appellate courts. The merits of the issue has been heretofore ignored by these courts.

On direct appeal to the United States Supreme Court, the court dismissed for lack of jurisdiction. Petitioner now realizes that the issues of that appeal was presented incorrectly.

In presenting the issue of constitutionality, petitioner argued that both state and federal courts barred argument on the merits of the question. In Beal Properties vs SLA (37 NY 2d 38) an important landmark decision of the New York Court of Appeals, the court ignored the issue of unconstitutional vagueness and reversed on other grounds. In Salem Inn vs SLA (433 F Sup 183- 1977) - almost identical to the instant action-the Court of Appeals for second circ. dismissed on grounds of abstention because of a pending appeal in the New York Court of Appeals. The court said, " Since it is the pendency of the state

proceedings rather than the nature of the initial forum that makes federal intervention untenable." It should rationally follow that assuming Salem's appeal fails in the state court, that Salem would be justified in renewing the same action in Federal court. Applying the same reasoning, petitioner who has already exhausted state remedies should follow the precedent of Salem.

Also, following the rational in Salem, " It seems clear that if appellant had actually failed to assert his constitutional claim in state court, he could not get a writ of certiorari from the non-constitutional judgment of the state court".

(28 USC 1257 -3, Sc Ct rule 19; Lombard vs Bd. of Ed, 1974 2nd circ. 503 F 2d 631; Cardinale vs Louisiana, 394 US 437; Ellis vs Dixon, 349 US 458; American Surety vs Baldwin, 287 US 156; failure to make seasonal federal claim)

In Olliott vs Murphy (453 F Supp 354) although the court upheld the principle of res judicata, it voiced the doubts raised by other circuits that, " there may be those who question whether barring state plaintiffs from lower court tribunals on principles of res judicata makes for sound federalism". That court was echoing the doubts raised by Judge Oakes in his concurring opinion in Turcoe vs Monroe Bar As. 554 F 2d 515 and Tang vs App. Div. 487 F 2d 138 and the 6th circuit decision in Getty vs Reed, 547 F 2d 971.

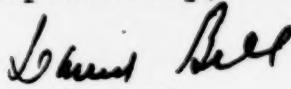
Also Justice Brennan and Marshall were early converts to this view. In their dissent in Juidice vs Vail, 43 US 327,

51 L Ed 2d 376, 7 S Ct. 1211, they deplored, " the stripping of all meaningful content from 42 USC 1983 and referred to their earlier dissent with Justice Douglas in Huffman vs Pursue, 490 US 592. Brennean further argued that, " the very purpose of Sect. 1983 was to interpose the federal courts between the states and the people as guardians of the people's federal rights". The same arguments are equally applicable to the bar of 11th amendment immunity by the states.

WHEREFORE, petitioner prays this court to grant this petition for writ of certiorari so that the merits of the issue can be considered.

Dated: September 20, 1979
Monticello N.Y.

Respectfully,


David Bell

Petitioner, pro se

APPENDIX A-ORDER EXTENDING THE TIME TO
FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. A- 187

David Bell,
Petitioner,

v.

New York State Liquor Authority,

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

Upon consideration of the application
of petitioner,

It is ordered that the time for filing
a petition for writ of certiorari in the
above entitled cause be, and the same is
hereby extended to and including

November 24, 1979

Thurgood Marshall
Associate Justice of the
Supreme Court of United
States

Dated:

29th day of
August 1979

APPENDIX B - OPINION OF COURT OF APPEALS
FOR SECOND CIRCUIT.

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House in the City of New York, on the Twenty- seventh day of June, 1979.

Present: Hon. J. Edward Lumbard

Hon. Walter R. Mansfield

Hon. Murray I. Gurfein

Circuit Judges

David Bell,
Plaintiff- appellant

- against-

Docket #

New York State Liquor
Authority,
Defendant- appellees

79-7917

Upon this appeal by David Bell from a judgement of the District Court for the Southern District of New York entered on February 28, 1979, pursuant to an order of Judge Charles Brieant dated February 23, 1979, dismissing Bell's pro se complaint,

which claims under 42 USC 1983 that appellee violated his constitutional rights by revoking his New York State liquor license and directing forfeiture of two \$ 1,000 bonds because of alleged violations of sect. 106-6 of the N.Y. State Alcoholic Beverage Control Law, including his allegedly permitting lewd and indecent performances on the licensed premises, allowing patrons and/or employees to bring narcotics onto the premises and permitting the premises to be used for immoral purposes and to promote prostitution, the order of the district court is

AFFIRMED. The action is barred on grounds of res judicata since the same constitutional issues raised here were adjudicated in Matter of Bell vs State Liquor Authority, 62 App. Div 2d 1066, leave to appeal denied. 44 NY 2d 647, (1978) appeal dismissed for want of jurisdiction, 47 US LW 3463 (Jan 8 1979), see Winters v Lavine, 574 F 2d 46, 54-69 (2nd Circ. 1978), and could have been raised in Bell vs Roth Dkt #79-7014 (2nd Circ. March 10, 1979), an action by Bell asserting related constitutional claims against individual members of the New York State Liquor Authority, in which summary judgement dismissing the complaint was affirmed by us.

Since Bell's alleged conduct clearly fell within the scope of Sect. 106-6 of the N.Y State Alcohol Beverage Control Law he " may not successfully challenge it

for vagueness." Parker v, Levy 417 US 733, 756 (1974). See also Broderick vs. Oklahoma 413 US 601, 608 (1973).

In any event this suit against appellees, a state agency is barred by eleventh amendment. see Alabama vs. Pugh 438 US 781 (1978) Edelman vs Jordan 415 US 615 (1974)

J. Edward Lumbard
U.S.J.C

Walter R. Mansfield
U.S.J.C

Murray R. Gurfein
U.S.C.J